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ABSTRACT

There is no final answer to the question of whether a school district with non-English-speaking students has a legal obligation to provide a bilingual-bicultural education for those students. School districts subject to the provision of Title VI of the Civil Rights Act of 1964 may be required to provide the Office of Civil Rights with a plan for voluntary compliance with that statute and may be asked to prove that their methods are at least as effective as the approved bilingual-bicultural program endorsed by the Department of Health, Education, and Welfare (HEW). Although the courts have yet to define the requirement in the Equal Educational Opportunities Act of 1974 for "appropriate action to overcome language barriers," it is reasonable to expect that if such a definition becomes necessary, the courts will rely on the HEW regulations and policy statement for the enforcement of Title VI. It is clear that bilingual-bicultural education may be ordered by a federal district court as a portion of the remedy in cases of segregation of national origin-minority students in violation of the Equal Protection Clause of the Fourteenth Amendment. (Author/IRT)

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A Legal Memorandum

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BILINGUAL-BICULTURAL EDUCATION: A PRELIMINARY VIEW

Does Title VI of the Civil Rights Act of 1964, as interpreted by the United States Supreme Court in *Lau v. Nichols*, require school districts subject to the statute to provide a bilingual-bicultural education program for students whose primary or home language is other than English? Is a bilingual-bicultural program mandated by the Equal Educational Opportunities Act of 1974 or the Equal Protection Clause of the Fourteenth Amendment in school districts not covered by Title VI? If some instructional program for students whose primary or home language is other than English is required by law, must a district adopt a bilingual-bicultural program rather than one offering English as a second language or some other instructional strategy? What exactly is a bilingual-bicultural instructional program? These and other questions are being asked by school officials throughout the country as the Office of Civil Rights of the Department of Health, Education, and Welfare devotes increasing attention to the educational problems of public school students who lack a full command of English because of nationality. This Legal Memorandum will attempt to define some of the legal obligations of school districts to such students. Final answers must await the outcome of the additional litigation that will be the likely result of the present effort by the Office of Civil Rights to stimulate the adoption of bilingual-bicultural education programs.

Title VI of the Civil Rights Act of 1964, HEW Regulations, and *Lau v. Nichols*

Section 601 of the Civil Rights Act of 1964[1] provides in part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Under the authority of Section 602 of the Act, HEW issued regulations which require a school district receiving federal funds not to:

> Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit . . . .[2]

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1. Public Law 88-352, 78 Stat, 252, hereinafter cited as 42 U.S.C. 2000d.
2. 45 CFR Sec. 80.3(b)(1)(iv).

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To clarify the meaning of the regulations as they apply to discrimination against students deficient in English language skills, HEW's Office of Civil Rights instructed school districts with more than five percent national origin-minority group students as follows:

> (1) Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.[3]

The HEW regulations, the policy statement, and the Equal Protection Clause of the Fourteenth Amendment were all considered by the United States Supreme Court in *Lau v. Nichols*,[4] in which the Court faced a class action on behalf of non-English speaking Chinese students in the San Francisco school system. The students alleged that the failure of the school district to offer supplemental courses in English to about 1,800 pupils of Chinese ancestry was a violation of both the Equal Protection Clause and of Section 601 of the Civil Rights Act of 1964. The school district was providing supplemental courses in the English language for about 1,000 Chinese pupils, but the other 1,800 were not receiving that instruction. The Supreme Court found in favor of the students, but it declined to reach the equal protection issue, preferring to rest its decision on Title VI and the supporting HEW regulations and policy statement. According to the Court:

> Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.
>
> We do not reach the Equal Protection Clause argument which has been advanced but rely solely on Section 601 . . . .
>
> That section bans discrimination based "on the ground of race, color, or national origin," in "any program or activity receiving federal financial assistance" . . . .
>
> . . . . . .
>
> It seems obvious that the Chinese-speaking minority receives fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program--all earmarks of the discrimination banned by the regulations . . . .[5]

Following the Supreme Court's affirmation of both the Title VI regulations and the May 25, 1970, policy statement in *Lau v. Nichols*, the Office of Civil Rights advised

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3. J. Stanley Pottinger, Office of Civil Rights, Memorandum to School Districts with More than Five Percent National Origin-Minority Group Children, May 25, 1970, 35 Fed. Reg. 11595.
4. 414 U.S. 563, 94 S.Ct. 786 (1974).
5. 414 U.S. 563, 566, 568 (1974).

chief state school officers that it had, through the appointment of a Task Force, developed an outline of those educational approaches that would constitute the "affirmative steps" referred to in the policy statement upheld by the Supreme Court. The outline was published by HEW as Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under *Lau v. Nichols*.

HEW went on to say that school districts found to be in non-compliance with the provisions of Title VI relating to national-origin minority group children with English language problems would "be required to develop specific voluntary compliance plans to eliminate discriminatory educational practices (including the effects of past practices)."[6] Voluntary compliance plans that included the educational strategies set forth in the Task Force Findings would be accepted by the Office of Civil Rights, but any district that elected to submit a plan based on other educational methods would be required to prove that its methods would be, at a minimum, equally as effective as those programs described in the Task Force Findings.

Finally, local districts were told that the Office of Education has established General Assistance Centers, commonly called "Lau Centers," to provide technical assistance to school districts in the development of the required voluntary compliance plans.

An examination of the Task Force Findings reveals an almost complete reliance upon bilingual-bicultural or multilingual-multicultural programs and strongly suggests that voluntary compliance plans based upon English as a second language or other approaches would not be acceptable to the Office of Civil Rights.[7] HEW defines a bilingual-bicultural program as one:

> . . .which utilizes the students' native language (example, Navajo) and cultural factors in instruction maintaining and further developing all the necessary skills in the student's native language and culture while introducing, maintaining and developing all the necessary skills in the second language and culture (example, English). The end result is a student who can function, totally, in both languages and cultures.[8]

In April 1975, the Office of Civil Rights announced that it was requesting the assistance of chief state school officers in 26 states to check on compliance of 333 school districts in providing language assistance to national origin-students. The selected districts included those:

> (1) that report more than 4,000 national origin-minority students who are not receiving any type of special language instruction.
> (2) that report an enrollment of more than 1,000 national origin-minority students with less than 10 percent of them receiving special language instruction.[9]

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6. T. H. Bell, Commissioner of Education, Memorandum August 11, 1975, to Chief State School Officers.
7. In discussing educational programs for the elementary level, Task Force Findings says: "Because an ESL program does not consider the affective or cognitive development of students in this category and time and maturation variables are different here than for students at the secondary level, an ESL program is not appropriate." p. 7.
8. Task Force Findings, p. 21.
9. HEW Office of Civil Rights, Fact Sheet: Equal Educational Services, April 1975.

As the data from these districts are examined, some may be notified that they are in non-compliance, and must develop the required plan for voluntary compliance. Officials of the Office of Civil Rights disclaim any intent to establish bilingual-bicultural education as the only way to satisfy the requirements of Title VI. In this context, it is important to remember that the HEW regulation that was upheld in *Lau* required only that a district "take affirmative steps to rectify the language deficiency." The Court did not say that a bilingual-bicultural instruction program is the only "affirmative step" that would satisfy the requirements of Title VI.[10] It remains to be seen whether the Office of Civil Rights will find acceptable any plan that does not include a bilingual-bicultural program or a multilingual-multicultural program as outlined in the Task Force Findings.

The Equal Educational Opportunities Act of 1974

Congress passed the Equal Educational Opportunities Act of 1974[11] as a part of the Education Amendments of 1974.[12] Although the Act is directed primarily toward appropriate remedies in racial desegregation cases, it also provides, in part:

> Sec. 1703. No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by . . .
>
> (f) The failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by students in its instructional program.

The statute authorizes civil actions in federal district courts by individuals or the Attorney General of the United States seeking appropriate relief.

This law has not been the subject of extensive judicial exposition yet.[13] It appears, however, to be an exercise of Congress' power to enforce the Equal Protection Clause, and may be an alternative statute under which a school district not subject to Title VI might be required to institute a bilingual-bicultural program if a federal district judge was convinced that such a program was, in the words of the law, "appropriate action to overcome language barriers." It is reasonable to expect that the federal courts will be guided by HEW's Title VI regulations and *Lau v. Nichols* in determining just what "appropriate action" means. By this process, "appropriate action" under this Act may become synonymous with "affirmative steps" under Title VI where students with English language barriers are concerned.

Such a result is suggested by the decision of the U.S. Fifth Circuit Court of Appeals in *Morales v. Shannon*.[14] A federal district judge had ruled that the elementary schools of Uvalde County, Texas, were not discriminating against the Mexican-American plaintiffs by failing to provide a bilingual-bicultural program. The Court of Appeals,

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10. See the concurring opinion of Justice Blackmun, 414 U.S. 571, 572. On the limits of the power of the federal courts to order specific remedies in bilingual-bicultural education cases under Title VI, see *School District No. 1 Denver, Colo., v. Keys*, 521 F.2d 465 (1975) *cert. denied*, 44 LW 3399 (1/12/76).
11. Public Law 93-380, 88 Stat. 514, 20 U.S.C. 1701.
12. Public Law 93-380, 88 Stat. 484, 20 U.S.C. 821.
13. A case involving the employment discrimination provisions of the Act has been reported. *Alvarez-Ugarte v. City of New York*, 391 F. Supp. 1225 (1975).
14. 366 F. Supp. 813 (WD Texas, 1973), rev'd in part, 516 F.2d 411 (5th Circ. 1975).

after hearing from the school system that it had begun a bilingual-bicultural program in the first grade and planned to add one grade each year, remanded the issue to the district judge for new hearings. In its opinion, the appellate court referred to the Equal Educational Opportunities Act:

> It strikes us that this entire question goes to a matter reserved to educators. However, on the off chance that defendants are engaging in discriminatory practices in the program as it currently exists, we . . . remand to the district court for further consideration there on a fresh record in the event appellants determine to pursue the question. It is now an unlawful educational practice to fail to take appropriate action to overcome language barriers. See Sec. 204(f) of the Equal Educational Opportunity (sic) Act of 1974 . . . . See also *Lau v. Nichols*[15] . . . .

With the district judge's attention drawn to the Supreme Court's decision in *Lau* as a means of understanding the Equal Educational Opportunities Act, he could easily conclude that a language program that meets the requirements of Title VI also constitutes "taking appropriate action to overcome language barriers." It is also possible, however, that district court judges will follow the suggestion made by the Fifth Circuit in *Morales*, and hold that the nature of the program a district should use is "a matter reserved to educators." Only additional decisions concerning the Act will determine if one of these two approaches or some other interpretation will be employed.

The Equal Protection Clause of the Fourteenth Amendment

The question of whether the Equal Protection Clause of the Fourteenth Amendment requires a school district not subject to the Title VI requirements to provide a bilingual-bicultural program for its students with English language difficulties is a complex one. Although the Supreme Court refused to reach the issue in the context of the Chinese students in *Lau v. Nichols*, lower federal courts have ordered bilingual-bicultural education programs in cases where school districts have been found to have discriminated against non-English speaking minorities. For example, in *United States v. Texas*[16] a federal district court found the San Felipe Del Rio area to have been operating a de jure dual school system based upon segregation of Mexican-American students. As a part of the remedy, the court ordered a comprehensive bilingual-bicultural program that included: instruction in the pupil's language system (English, Spanish, or a blend of both) in heterogenous classrooms in grades K-4; the teaching of both English and Spanish as second languages to pupils in grades 5-8; and the provision of bilingual-bicultural guidance personnel at grades 9-12, together with modification and expansion of the curriculum in various content areas to respond to the life styles, family structures, and needs of the children of all cultures represented in the student body.

In *Arvizu v. Waco Independent School District*, another federal district judge ordered the school district to expand and improve its bilingual-bicultural activities to provide equal educational opportunities for Mexican-American students because the students were an identifiable ethnic group entitled to be assured the equal protection of the laws even though their segregation within the school system did not result from the action of the state.

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15. 516 F.2d 411, 415 (1975).
16. 342 F. Supp. 24 (ED Tex. 1971) aff'd 466 F2d 518 (5th Cir. 1972).

> Although we find that the isolation of Mexican-Americans in Waco is not the result of the past state action, our finding that Mexican-Americans in Waco are an identifiable ethnic class with special educational needs does impose upon the WISD an affirmative obligation to assure that Mexican-American students are assured the equal protection of the laws in the future . . . .[17]

These two pre-*Lau* cases, and others[18] demonstrate the willingness of federal district judges to order bilingual-bicultural programs in cases involving both the de jure and de facto segregation of ethnic minority students in violation of the Equal Protection Clause.

The refusal of the Supreme Court to deal with the equal protection question in *Lau* has been noticed by lower courts in recent cases involving attempts to secure bilingual-bicultural programs. In *Serna v. Portales Municipal Schools*,[19] the United States Circuit Court for the 10th Circuit upheld a district judge who had ruled the schools of Portales were discriminating against Spanish-surnamed children because they failed to offer an adequate bilingual-bicultural program for them. The appeals court, referring to *Lau*, said:

> The trial court noted in its memorandum opinion that appellees claimed deprivation of equal protection guaranteed by the 14th amendment and of their statutory rights under Title VI of the Civil Rights Act, specifically, Sec. 601. While the trial court reached the correct result on equal protection grounds, we choose to follow the approach adopted by the Supreme Court in *Lau*; that is, appellees were deprived of their statutory rights under Title VI of the 1964 Civil Rights Act . . . .[20]

Although the court followed the Supreme Court's lead by resting its decision on the statutory grounds of Title VI in this case, it also suggests that the Equal Protection Clause would require the same result if the district had not been subject to Title VI.

The Fifth Circuit Court has also recently chosen a statutory ground in preference to the Equal Protection Clause. In *Morales v. Shannon*[21] the court overruled the findings of a lower court that there was no segregatory intent against Mexican-Americans in Uvalde County, Texas. The issue of the adequacy of bilingual-bicultural education was remanded to the lower court for further hearings, with the attention of the judge directed to both the Equal Educational Opportunities Act of 1974 and the *Lau* decision.

Although these cases appear to establish the authority of federal district courts to order bilingual-bicultural programs of education to remedy both de jure and de facto discrimination against national origin-minority students in violation of the Equal Protection Clause, some limits on that power have been voiced by the United States Court of Appeals for the 10th Circuit in *Keys v. School District No. 1, Denver, Colo.*[22] The court held that a district judge had overstepped his remedial

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17. 373 F.Supp. 1264, 1269 (WD Tex., 1974).
18. See *Keyes v. Sch. Dist. No. 1*, 380 F.Supp. 673 (D Colo. 1974); *Serna v. Portales Municipal Schools*, 351 F.Supp. 1279 (D N.M. 1972).
19. 351 F.Supp. 1279 (D N.M. 1972) aff'd, 499 F.2d 1147 (10th Cir. 1974).
20. 499 F. 2d 1153 (1974).
21. Supra, Note 14.
22. 380 F.Supp. 673 (D Colo. 1974) rev'd in part, 521 F.2d 465 (10th Cir. 1975).

powers when he ordered the school district to begin a comprehensive and complex bilingual-bicultural plan of instruction known as the "Cardenas Plan," a remedy that has been urged upon the judge by the Congress of Hispanic Educators.

> . . .But the court's adoption of the Cardenas Plan, in our view goes well beyond helping Hispano school children to reach the proficiency in English necessary to learn other basic subjects. Instead of merely removing obstacles to effective desegregation, the court's order would impose upon school authorities a pervasive and detailed system for the education of minority children. We believe this goes too far.
> . . . . . .
>
> The clear implication of arguments in support of the court's adoption of the Cardenas Plan is that minority students are entitled under the 14th Amendment to an educational experience tailored to their unique cultural and developmental needs. Although enlightened educational theory may well demand as much, the Constitution does not . . . .[23]

A request by the Congress of Hispanic Educators that the Supreme Court hear this case and reinstate the "Cardenas Plan" has been denied.[24]

Keyes suggests that plaintiffs in such cases should not be permitted to impose their own specific instructional plan upon a school district that has an obligation to provide a program for its minority students.[25] If followed by other courts, the rationale of *Keyes* could preserve to the educational professionals within the district the decision of specific components of any bilingual-bicultural program the district may be required to adopt.

Summary

There is no final answer at this time to the question of whether or not a school district with non-English-speaking students has a legal obligation to provide a bilingual-bicultural education program for those students. School districts subject to the provisions of Title VI may be required to provide the Office of Civil Rights with a plan for voluntary compliance with that statute. If the plan of the district for "affirmative steps" to meet the needs of non-English-speaking students is based on educational methods other than those described in Task Force Findings the district must prove that its methods are at least as effective as the bilingual-bicultural program endorsed by HEW. Failing such proof, the district may face a choice between adoption of the programs in Task Force Findings or an extended court fight to prevent the loss of its federal financial assistance.

Although the courts have yet to define the requirement in the Equal Educational Opportunities Act of 1974 for "appropriate action to overcome language barriers," it is reasonable to expect that if such a definition becomes necessary, the courts will rely on the HEW regulations and policy statement for the enforcement of Title VI.

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23. 521 F. 2d 482 (1975).
24. *Congress of Hispanic Educators v. School District No. 1*, No. 75-702, *cert. denied*, 44 LW 3399 (1/12/76).
25. The Court says that even if the district had been violating Sec. 601 of the Civil Rights Act of 1964 which it was not, the requirement for the adoption of the Cardenas Plan would overstep the scope of the remedy properly directed to the violation. 521 F.2d 465, 483 note 22.

Lastly, it is clear that bilingual-bicultural education may be ordered by a federal district court as a portion of the remedy in cases of both de jure and de facto segregation of national origin-minority students in violation of the Equal Protection Clause of the Fourteenth Amendment. The exact nature of the program to be ordered into effect may be subject to the limitation, suggested by the decision in *Keyes*, that unnecessarily specific and complex bilingual-bicultural programs may not be imposed upon districts already making substantial efforts to aid pupils with English difficulties. The question of whether the Equal Protection Clause requires a bilingual-bicultural education program in a district not subject to the provisions of Title VI and not discriminating against national origin-minority students in any way has not been answered by the courts.[26]

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26. The 10th Circuit seems to suggest that it would find the Equal Protection Clause does impose the requirement. *Serna v. Portales Municipal Schools* 499 F. 2d 1147 (1974). The Supreme Court simply elected not to answer the question in *Lau v. Nichols*, 414 U.S. 563 (1974).

    Legal issues continue to arise even after a district has begun a bilingual-bicultural program. See *Parents Committee v. Community School Board*, 524 F.2d 1138 (2nd Cir. 1975), concerning how federal funding should be distributed between public and private schools within the district; and *Aspira v. Bd. of Ed. of the City of New York*, 394 F. Supp. 1161 (1975), a controversy about the correct way to identify those students who should participate in the program.

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